82-1439

No.

In the
Supreme Court of the United States
OCTOBER TERM, 1982

LEON BORKOWSKI
Petitioner,

vs.

IRENE BORKOWSKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ROBERT P. SHERIDAN
SAPOZNICK, SHERIDAN & FREIDIN
33 North Dearborn Street
Chicago, Illinois 60602
(312) 782-9444
Attorney for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED FOR REVIEW

Whether the Appellate court of Illinois, and the Illinois Supreme Court, by denying Petitioner's Petition for Leave to Appeal, failed to identify and correct a denial of due process and equal protection of law by permitting the trial court to enter, against Petitioner, a judgment without having afforded him an opportunity to be heard with respect to the matters there at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Miscellaneous

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To The Justices Of The Supreme Court Of The United States:

Petitioner, Leon Borkowski, respectfully prays that a Writ of Certiorari issue to review the decision and order of the Illinois Supreme Court[1] denying review of the judgment and order of the Appellate Court of Illinois, First Judicial District, affirming, in part, a judg-

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[1] The Illinois Supreme Court is empowered to review judgments of the Appellate Court of Illinois, and in the instant case has failed to do so, but rather, by denying Petitioner Leave to Appeal, may be seen to have affirmed the decision of that Court. Alternatively, if the Court deems it more appropriate that the writ be directed instead to the Appellate Court of Illinois, it is requested that this Petition be so read.

ment adverse to him entered by Circuit Court of Cook County, Illinois.

OPINIONS BELOW

The Opinion of the Illinois Appellate court, First Judicial District, rendered on August 9, 1982, being an order disposing of appeal pursuant to Illinois Supreme Court Rule 23,[2] is not reported in the Illinois Appellate

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[2] Rule 23 of the Illinois Supreme Court States:

Disposition of Cases in the Appellate Court

A case shall be disposed of by opinion when a majority of the panel deciding the case determines that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; (3) the decision is of substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history. Regardless of whether any one of the above criteria has been met, whenever a concurring or dissenting opinion is proposed to be filed, the case shall be disposed of by opinion unless the panel unanimously decides otherwise. In that event, the case shall be disposed of by order and the fact of concurrence or dissent may be noted. In all cases disposed of by opinion, the opinion or opinions shall be published.

All cases not required by the foregoing paragraph to be disposed of by opinion shall be disposed of by a written order which shall succinctly state the facts, the contentions of the parties, the reasons for the decision, the disposition, and the names of the participating judges. Orders are not precedential and will not be published. They may be invoked, however, to support contentions such as double jeopardy, res judicata, collateral estoppel, or the law of the case. When so invoked, a copy of the order shall be furnished to other counsel and the court.

Reporter nor in the Northeastern Second Reporter. That opinion is reproduced as Appendix C to this Petition. The Illinois Supreme Court rendered no opinion in refusing to grant Petitioner's Petition for Leave to Appeal. The Order denying leave to appeal is attached hereto as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3). The Appellate Court of Illinois entered its disposition order on August 9, 1982 (see: Appendix C) affirming the judgment of the Circuit Court of Cook County (see: Appendix B). The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on November 30, 1982 (see: Appendix D): this Petition is timely filed within 90 days thereafter.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 505 of the Illinois Marriage And Dissolution Of Marriage Act, Ill. Rev. Stats., 1980, ch. 40, § 505, states as follows:

505. Child support—Contempt—Penalties

(a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of mar-

riage, or a proceeding for child support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct, after considering all relevant factors, including

(1) the financial resources of the child;

(2) the financial resources and needs of the custodial parent;

(3) the standard of living the child would have enjoyed had the marriage not been dissolved;

(4) the physical and emotional condition of the child, and his educational needs; and

(5) the financial resources and needs of the noncustodial parent or parents.

(b) Failure of either parent to comply with an order to pay support, shall be punishable as in other cases of contempt. In addition to other penalties provided by law the Court may, after finding the parent guilty of contempt, order that the parent be:

(1) placed on probation with such conditions of probation as the Court deems advisable;

(2) sentenced to periodic imprisonment for a period not to exceed 6 months; provided, however, that the Court may permit the parent to be released for periods of time during the day or night to:

(a) work; or

(b) conduct a business or other self-employed occupation.

The Court may further order any part or all of the earnings of a parent during a sentence of periodic imprisonment paid to the Clerk of the Circuit Court or to the parent having custody or to the guardian having custody of the minor children of the

sentenced parent for the support of said minor children until further order of the Court.

STATEMENT OF FACTS

On December 10, 1979, Leon Borkowski instituted an action for dissolution of marriage from his wife, Irene, in the Circuit Court of Cook County, Illinois. This case involved, during its pendency, questions of division of marital property and support and education of the parties' two children. Some of these issues were resolved by agreement; some were disputed. A judgment for dissolution of marriage was entered in this cause on November 16, 1981, dissolving the marriage, granting joint custody of the children to the parties, and approving and incorporating the separation agreement made between them. The questions of child support were, however, not addressed in that Decree, since the parties were not able to reach an agreement as to those issues. Child support questions are, in Illinois, controlled by statute, specifically Illinois Revised Statute, Chapter 40, Section 505 (fully set out, *supra*) which requires that the Court take into account the financial resources of each party and the ability of each to pay. This section is understood by Illinois law to require a hearing, but such was never accorded to Leon Borkowski in this case. Rather, the Court, having consistently denied him all opportunity to present evidence of his financial resources, on December 11, 1981, over his objections, entered a Supplemental Judgment ordering him to pay $1412.00 monthly for the support and educational expenses of the children. This order was a monstrous contrivance in view of the facts of his financial condition: he was unemployed, without any source of income and his savings account was approximately $5,000.00. But these

facts the court steadfastly refused to hear. On January 6, 1982, Leon Borkowski filed a Motion to Vacate the Order of December 11, 1981, placing before the trial court his actual financial circumstances and raising the claim that these proceedings, and particularly the trial court's failure to hear evidence, violated his constitutionally protected rights to due process and equal protection of the laws. (See: Appendix A) Although no response was filed to this motion, it was denied by the trial court.

Subsequently, Leon Borkowski appealed to the Appellate Court of Illinois, First Judicial District, primarily on the basis of these constitutional deprivations. The case there pended as matter number 82-78, and on August 9, 1982, the Appellate Court, pursuant to Rule 23 of the Rules of the Supreme Court of Illinois, issued a Disposition Order[3] reversing the trial court with respect to the $400.00 monthly payments to be made on behalf of Michael's personal expenses, but otherwise affirming the trial court.

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[3] Illinois Supreme Court Rule 23 (fully set out; supra) allows the Appellate Court to dispose of an appeal by order, unpublished and without precedential value.

Leon Borkowski next filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois, (which pended there as matter number 57408), based almost exclusively on the constitutional deprivations mentioned above as well as a new constitutional issue which had been raised by reason of the Appellate Court's determination, that Court having held that due process had been satisfied by an *in camera* review of documents not in evidence. This Petition was denied on November 30, 1982, without opinion. By consequence of which all, Leon Borkowski now, within 90 days next after the order of the Illinois Supreme Court, brings this Petition for Certiorari to redress the deprivation of fundamental rights of due process and equal protection of law, which he has suffered in the instant cause.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HIS DUE PROCESS RIGHT TO A HEARING.

A lengthy recitation of authority is not needed, Petitioner is sure, to persuade this court that a right to be heard is fundamental, and that due process and equal protection of the law, guaranteed by the Fourteenth Amendment, requires that a litigant is entitled to have his evidence heard before a court can deal away his property. In Cook County, Illinois, however, the exigencies of an enormous case load have caused the court system to prefer the virtue of speedy disposition to even the most fundamental rights of the parties. This is particularly true in the matrimonial division, where 17 trial judges are expected to deal with the 25,000 cases annually filed in that division.[4] The result of this situation has been a deterioration of, first the formalities, and more lately, the basic requirements of law and justice.[5] Additionally, the courts of review of Illinois

[4] Data informally kept by the Office of the Clerk of the Circuit Court of Cook County, Illinois, indicates that in 1981, 28,592 new cases were filed in the Matrimonial Division, in 1982, 25,413 new cases.

[5] This view is not the private opinion of the Petitioner only, but of many. For example, Petitioner asks leave to call the Court's attention to the observation of Judge Prentice H. Marshall of the United States District Court for the Northern District of Illinois, who, on April 16, 1982, in *Provident Life and Accident Insurance Co. et al* v. *Ostertag, et al* (81 C 1097), speaking of the Matri-

have become increasingly more willing to affirm the decisions of the trial courts in matrimonial cases, particularly where the questions on appeal are ones of sufficiency of evidence or proper use of discretion, as opposed to questions which are primarily legal in their character. In short, the Petitioner submits that, in matrimonial matters heard in the Circuit Court of Cook County, litigants are being routinely served with a brand of

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[5] (Continued)
monial Division of the Circuit Court of Cook County, said:

> THE COURT: I would be delighted to have the State Court resolve this problem. But I will tell you right now, the performance to date over there leaves me with the distinct impression that the insurer plaintiffs here are not being adequately attended to there. They have been on the hook now for months, indeed for years, while this circus goes on over there.
>
> And I am just telling you that that is the reason this case is here.
>
> MR. DIENSTAG: We understand, your Honor. It is unfortunate that that has occurred, but since we have —
>
> THE COURT: "Unfortunate" is as a gentle a word as you can use, sir.
>
> MR. DIENSTAG: All right. Your Honor, since we have gotten into the case —
>
> THE COURT: There are other words more appropriate.
>
> MR. DIENSTAG: We have attempted to control the situation and have everything decided in one forum so that the insurance companies can be protected. We have no intention and are certainly willing to comply with your Honor's order to have Mr. Gryka — the parties restrained from proceeding in any other forum.

proceeding which is far beneath that available in other types of civil or criminal cases, is far too summary, and fails to secure to the parties not only good justice, but even the most essential of rights — the right to a fair opportunity to a hearing.[6] Much of this laxity, as noted

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[5] (Continued)

> Incidentally, the divorce court orders originally provided that the insurance proceeds be deposited with the Clerk of the Circuit Court of Cook County as well, and Barbara was supposed to make application to that court for that — for the money. That was another reason why we thought the Divorce Court would be the proper forum —
>
> THE COURT: As I say, if anyone persuades me that they are doing their job over there, and if Gryka ever manifests his willingness to abide the orders of the Court over there, maybe we can get this matter resolved.
>
> But thus far the Illinois courts have not done their job in this case, and I believe that the plaintiffs here are entitled to relief, some kind of relief. I don't know. They don't care who gets the money. They are fed up with it, and I don't blame them.

[6] The problems inherent in judges taking an active rule in settling cases is becoming recognized. This Court may, for instance, be aware of the recent article, *Managerial Judges,* where the author notes:

> Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair and impartial adjudication.

Judith Resnik, *Managerial Judges* 96 Harvard Law Review 376, 380 (Dec. 82).

above, is doubtless due to the pressures of a staggering load of cases; much of it may be attributable to the feeling that matrimonial litigation is not really significant enough to occupy the attention of the courts, their best minds and best efforts. Such a view is a grave misconception, and Petitioner hopes that this Court will also voice its disagreement with it by allowing the Petition for Certiorari in this case.

This court will, doubtless, take notice of the fact that, apart from traffic violations, matrimonial controversies are the type of litigations which most Americans are now likely to experience. Unlike traffic violations, the sums in jeopardy are not small in such controversies. Many divorce cases involve the parties' whole estate, and in the case of men, much of their future earnings. Further, as the court is aware, unlike most other obligations imposed by judgment, relief cannot be had in bankruptcy. Additionally, an interstate system, enforced by prosecutorial agencies, exists to secure the payment of child support obligations. Finally, those failing to meet various decreed obligations may face, and are not infrequently sentenced to incarceration under court's contempt powers. In short, the economic effect of matrimonial litigation on a person is massive, and the average citizen is more likely to be involved in such controversies than any other, making his experience in the matrimonial forum a standard by which he may later assess both the courts generally and the efficacy of the whole ideal of ordered justice. That the dignity, a fortiori the requirements of law should be maintained in these is not less important than in other kinds of cases, therefore; perhaps, it is more so. Matrimonial cases are too important to the lives and property of too many of our

fellow citizens to be trivialized, as the Courts of Illinois have done. It has been observed to counsel for Petitioner (he begs the Court's indulgence in mentioning it) that placing a matter arising from a divorce case before the nation's highest court is an unseemly and even scandalous thing. But we submit that the scandal lies in this, that a litigant in a divorce case has no other forum than the nation's highest Court to secure a right so fundamental as a hearing. It has been suggested, also, that this Court is itself too burdened with significant matters to care about the quality of justice received by litigants in a county divorce court. We do not doubt that it is in reliance on such a view that courts may feel themselves free to prefer the benefits of speedy dispositions to the sometimes inconvenient labor of affording those rights which our Constitution guarantees. But the facts in this case, we are confident, this Court cannot countenance, and will not leave unremedied.

Stated most simply, Leon Borkowski, the Petitioner, was never given an opportunity to be heard before he was ordered to pay $1412.00 monthly as child support. The power of the Illinois courts to order child support is derived from section 505 of the Illinois Marriage and Dissolution of Marriage Act (fully set forth, *supra*). This section, by its own language, requires the court to consider "all relevant factors", including, *inter alia*, "the financial resources and needs of the noncustodial parent. . . ." Illinois courts have interpreted this section as requiring that any such order be supported by sufficient evidence. For example, in *Mathews* v. *Mathews* (1976) 42 Ill. App. 3d 1049, 1053, 356 N.E.2d 1083, 1087, the Appellate court of Illinois reversed and remanded an award of child support, declaring:

> The amount of child support to be assessed against each parent is to be determined by the facts and circumstances in each case and the failure to properly consider such circumstances of either divorced parent in determining the amount of child support is considered to be an abuse of discretion, *and such child support order, if not sustained by the record will be set aside.* [emphasis added]

More recently, in *In Re Marriage of Brophy* (1981) 96 Ill. App. 3d 1008, 421 N.E.2d 1308, the Appellate Court of Illinois was presented with a practice in which the trial court (again the Circuit Court of Cook County) had abused its discretion by, although having properly determined the parties' economic resources, then applying a fixed percentage figure to arrive at its child support order. There, the order was reversed for failing to follow the statutory mandate that "all relevant factors" be considered. How much more grevious are the facts in the case at bar, where the Petitioner has been denied even the opportunity of presenting evidence as to financial circumstances.

Those circumstances appear from the uncontested affidavit of Leon Borkowski (See: Appendix A). At the time of this order he was unemployed, had no ongoing income, and had no more than $5,000.00 left in savings. It is true that, jointly with his wife, he owned an apartment complex, heavily mortgaged, known as Villa Fontana, which was operating at a loss and payments for which were in default, but which might, at a future time, produce funds for him, if it could be sold. But there is no authority in Illinois, nor in justice could there be, allowing a court to order present payments of child support based on the possibility of funds to be received

at some uncertain time in the future, in some speculative amount. Petitioner concedes that upon future receipt of such funds his financial ability to pay might be alerted, and re evaluation of his obligation appropriate. He denies strenuously, however, that such speculative contingency obviated the need for consideration of his present financial condition or the right to be heard upon that issue.

The foregoing facts and arguments were all presented to the Illinois Appellate Court which, rather than deal with these issues, elected to ignore them and, with one exception (the personal expenses for Michael), to affirm the trial court. In order to do that, the Appellate Court of Illinois wrote an opinion (in the form of a Rule 23 Order, by which means the Order remained unpublished and, hence, free from public scrutiny) which utterly ignores and misstates the Record in this case, as will be shown with particularity hereinafter. The force of the Appellate Court's Order, which appears on its face very well reasoned, is twofold. Its first part is that the Petitioner had had an opportunity to present evidence at a hearing on October 7, 1981, and had failed to do so; the second is that, under the authority of a case called *In re Marriage of Shedbalkar* (1981) 95 Ill. App. 3d 136, 419 N.E.2d 409, the trial court was empowered to make its judgment based upon *in camera* conferences. Neither of these positions are well founded, either in law or in the Record, as Petitioner will endeavor now to show.

First, there was never a trial on October 7, 1981 — there was a settlement conference on the record, which, as is manifest from that record, was a fact fully known to both counsel and the judge. Those proceedings (which

appear between pages 29 and 61 of Report of Proceedings in the Record on Appeal), consist almost exclusively of colloquies between counsel and the court to try to arrive at some mutually acceptable numbers, and the responses of Mrs. Borkowski in answer to questions by the court with regard to the needs of the children only. As these proceedings reached their conclusion, the court encouraged the parties to reach a settlement and to return on October 20, 1981, the court noting that it would be disappointed with counsel if they couldn't work the matter out (R.P.58). The Record leaves no fair question that the proceedings on October 7, 1981, although conducted in open court, were not a trial, were not viewed by any participant as a trial; but, if there had been a question, its nature as a settlement conference was subsequently acknowledged by all at the next hearing. There, it was the parties' painful duty to advise the court that a settlement had not been reached even after, as Mr. Rinella, Mrs. Borkowski's attorney, characterized it, the court had spent "at least thirty minutes on the bench trying to work out Larissa's support". (R.P.67) To this turn of affairs, the court stated plainly, (R.P.68-69):

> THE COURT: Let me go back here a stage. You see, I have no authority simply to rule on these issues in dispute unless there are some kind of an agreement, you have this problem.
>
> Now look, I have no authority to settle these differences as such, you know, as a technical proposition I can say to you if you have an agreement, fine, I can approve the agreement. If you don't have an agreement, fine, we will set it all down for trial.

That trial never materialized, however, despite the consistent and renewed requests of Petitioner. Rather, the trial court determined, only later, that the October 7

proceeding would do for hearing, and that it would rule without further proceedings. The absence of any reference on October 7 to the financial abilities of the parties, the court thought to cure by resort to *in camera* conversations, saying (R.P. 131):

> THE COURT: . . . I don't see anything in my records as to hearing on available cash at that time. I may have just operated on the basis of what was spoken in chambers.

The foregoing, and not the Appellate court's characterization, is what the Record truly reflects about the procedural due process afforded Leon Borkowski in the Circuit Court of Cook County. There was a pretrial, to settle the case, held on October 7, 1981, and, later, when the settlement was not agreed to by the Petitioner, as if to punish him for his obstinance, the settlement proceedings were declared to have been the trial after all, and an order was entered forthwith. Petitioner defies Respondent to tender either authority or cogent argument that such a circumstance fulfills the requirements of due process. Rather, plainly, the truth is that there was no trial afforded to the Petitioner.

As for the propriety of the trial court's use of information acquired *in camera* as a substitute for competent evidence, the Appellate Court pretends that there is authority for such a position in the form of *In re Marriage of Shedbalkar* (1981) 95 Ill. App. 3d 136, 419 N.E. 2d 409. That case is one in which the parties invited the trial court to rule based on in-chambers representations and exhibits entered into evidence. At no time did the parties ask the trial court to present further evidence, and no question was ever raised as to the adequacy of the hearings until there--Petitioner cross-appealed. The

Court there held that, where the parties had invited the trial court to rule based on *in camera* conferences, they could not object to such rulings for the first time on appeal. Leon Borkowski does not dispute the correctness of the *Shedbalker* decision on its own facts — but what application can it have to the case at bar, where the Petitioner did request a hearing, repeatedly, where the Petitioner moved for reconsideration for want of a hearing, where the Record reflects the following colloquy (at R.P. 69-70):

> THE COURT: But my question to you, Mr. Grant, is, are you prepared to have me rule on these disputed issues?
>
> MR. GRANT (trial counsel for Petitioner): After a hearing on those issues, yes, we are prepared.
>
> • • • •
>
> THE COURT: Well, how long is this hearing going to take?
>
> MR. RINELLA: I would say half a day, Your Honor.

It is manifest to the Petitioner that, in speaking these words, the court was fully aware that there had been no trial in this case, that the proceedings on October 7 were not a trial, were not supposed by any person to have been trial; such indeed, Petitioner submits, is manifest to any candid reader of the Record. For the trial court to later declare that the proceedings of October 7 *had been* a trial, is an abuse the equal of which would be difficult to imagine had not the Appellate Court gone on to approve the whole business, saying that the order appealed from recited that the judge had been fully advised, hence he must have been so advised, when the entire Record shows that he wasn't.

After the Appellate court ruled, the Petitioner proceeded to the Supreme Court of Illinois, which has the power to identify and correct due process violations, and has often done so. That Court, for instance, specifically held, in *People* v. *Rivers* (1951) 410 Ill. 410, 416, 102 N.E. 2d 303, 306, that decisions based on matters outside the record are a violation of due process and not to be countenanced, saying:

> The law is well settled that, exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the exhibits offered and admitted in evidence and the record made before him in open court. Any private investigation by the court constitutes a denial to the defendant of the constitutional guarantee of due process of law.

In the case at bar, however, the Illinois Supreme Court has erroneously failed to identify this error, and refused to correct a plain violation of the mandates of the Constitution.

Petitioner is unaware of any case determined by this Court having a factual situation in which a settlement conference was later declared to have been a trial, and which was then used as a basis for a judgment. Certainly, however, the cases decided by this and the Circuit Courts of Appeal which speak to the necessity of an opportunity to be heard, warrant the Petitioner in maintaining that the proceedings in this case did not secure to Leon Borkowski his right to due process and equal protection of law.

In the often cited case of *McVeigh* v. *United States* (1870) 11 Wall. 259, 267, the court said that the right to defend is inseparable from liability and that "[a] different result would be a blot upon our jurisprudence and

civilization." Again, in *Windsor* v. *McVeigh* (1876) 93 U.S. 274, 277, the court said:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Similarly, in *Hovey* v. *Elliott* (1897) 167 U.S. 409, 414, Justice White stated:

> To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

In short, the fact that due process requires that a hearing be afforded to the parties has never been controversial, at least not in this Court. Further, abuses far less grevious than these in the case at bar have been found to be violative of the Fourteenth Amendment, and require reversal. For example, *Carter* v. *Morehouse Parish School Board* (5 C.A. 1971) 441 Fed. 2d 380, held that due process had not been satisfied when the Petitioner had been denied a fair opportunity to present mere rebuttal evidence. There, the Fifth Circuit based its decision on this Court's opinion in *Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, where Justice Stewart noted:

> A fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Other cases, other quotations are available with respect to this issue; the Court is doubtless aware of many of them. None of them, Petitioner submits, suggest a foundation for saying that the conducting of a settlement conference and only later determining it to be a trial constitutes a fair opportunity to be heard, or is a meaningful manner of proceeding. Accordingly, not only to correct the deprivations suffered by this Petitioner but also to check an emerging pattern of procedural indifference in cases of this kind, this Honorable Court should grant Leon Borkowski's Petition for Certiorari.

CONCLUSION

Not in Cook County, Illinois only, but in many places where too few judges are taxed with a surfeit of cases, the need to dispose of these cases may be encroaching on the fundamental principles of justice which are not only the basis of our law, but of our liberty as well. The temptation to do this may be great, even understandable, but must not be tolerated. If, by this Court's action, certain localities realize that they may have to postpone the construction of yet another expressway, or some other public work, in order to secure enough judges to fairly administer justice in their communities, the Republic will not be the worse for it. Even dictatorships and totalitarianisms build roads, but just laws, fairly and im-

partially applied by courts to which all have equal access, are the glory and the foundation of a free state and people. Such a benison, which we have in the past defended from tyrants, we should not now surrender to administrative convenience.

Leon Borkowski well hopes that this Court will not be ashamed nor afraid to review this case because it arises from a county divorce court, knowing that this Court recognizes that those constitutional requirements, which have here been grievously ignored, are no less your Honors' only guarantee of justice, than they are his. For these reasons, then, Petitioner respectfully requests that a writ of certiorari issue for review and reversal of the judgment herein, or for such other relief and remedy in the premises as may be available or required as a matter of constitutional right or privilege.

Respectfully submitted,

Robert P. Sheridan
Sapoznick, Sheridan & Freidin
Suite 2025
33 North Dearborn Street
Chicago, Illinois 60602
(312) 782-9444
Attorney for Petitioner

APPENDIX A

Petitioner's motion to Vacate and Reconsider (and supporting Affidavit) filed January 6, 1982:

Comes now the Petitioner, LEON BORKOWSKI, and moves this Honorable Court to Vacate its Supplemental Order for Judgment for Dissolution of Marriage entered on December 11, 1981, for the grounds and reasons hereafter appearing:

1. That on December 11, 1981, the Court entered a Supplemental Order for Judgment for Dissolution of Marriage, which determined, inter alia, the property rights and past marital obligations of Petitioner, a true copy of which is attached hereto as Exhibit "A".

2. That the Court abused its discretion in entering said Order for the reason that it is unsupported by evidence, and, more particularly, the Court refused to hear the testimony of Petitioner, denying him his right to due process and equal protection of the law guaranteed him by the Constitutions of the United States and the State of Illinois.

3. That the evidence the Petitioner would have established such facts as would require, in law, an order requiring him to pay substantially smaller sums and awarding him a larger share of the marital property, as may be seen from the Affidavit of LEON BORKOWSKI, attached hereto as Exhibit "B".

WHEREFORE, Petitioner prays that the Supplemental Order for Judgment for Dissolution of Marriage be vacated, and that Petitioner be allowed to present evidence of his financial condition, and other matters relative to the issues herein.

LEON BORKOWSKI

By: /s/ Robert P. Sheridan
Sapoznick, Sheridan & Freidin
33 N. Dearborn Street-2025
Chicago, Illinois 60602
782-9444

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT

LEON B. BORKOWSKI, being first duly sworn upon his oath deposes and states that he is the Petitioner herein and makes this Affidavit in support of his Motion to Vacate and Reconsider and that he has personal knowledge of the matters herein affirmed (save those stated to be on information and belief, in which case he does verily believe the same), and that he is under no legal disability, and is competent to testify to the same, and further:

1. That Affiant is 54 years of age.

2. That he is now, and for the last two years past, been unemployed.

3. That when employed, he was employed as a draftsman but, due to illness and physical impairment, he is unable to be further employed in that capacity, and in addition has no training or experience that would fit him for other employment.

4. That presently, he is under continuous medical treatment with Dr. George Jacobi and others.

5. That although, as he is informed and believes, Respondent has between $30,000.00 and $40,000.00 in cash, his own cash assets do not exceed $5,000.00.

6. He has no other assets save a one-half interest in a property known as Villa Fontana, which is operating at a loss and for which the note is unpaid, and which he is actively seeking to sell, but for which no viable purchasers have been secured; and also a one-half interest in the marital residence, resided in by Respondent and his children, which, by the proceedings herein he is barred from selling at this time; in addition thereto, he is without household furnishings, and has only his personal effects.

7. Petitioner is without sufficient funds to meet the obligation imposed on him by the Court's Order of December 11, 1981.

8. Further Affiant sayeth not.

/s/ LEON B. BORKOWSKI
LEON B. BORKOWSKI

SUBSCRIBED & SWORN TO
before me this 4th day of
January, 1982.

/s/ Barbara Mazzuca
NOTARY PUBLIC

APPENDIX B

Supplemental Judgment of December 11, 1981:

COUNTY OF COOK)
) SS.
STATE OF ILLINOIS)

SUPPLEMENTAL ORDER

THIS CAUSE COMING ON to be heard on the motion of the Respondent, IRENE BORKOWSKI, for child support and educational expenses for the children of the parties, and the disposition of the former marital home, the court having heard testimony of the parties and argument of counsel, the court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That the Petitioner, LEON BORKOWSKI, pay to the Respondent, IRENE BORKOWSKI, the sum of $564.00 per month as and for child support for LARISSA commencing November 16, 1981 and continuing on the 16th day of each and every month thereafter until LARISSA attains majority or completes her high school education, whichever occurs last, or is otherwise emancipated.

2. That the parties shall equally share the educational expenses of MICHAEL commencing on the date MICHAEL enrolled at Loyola University; educational expenses for purposes of this Order are tuition, books, activities fees, laboratory fees and transportation to and from school. That the Respondent shall submit to the Petitioner bills and expenses incurred by MICHAEL for said expenses and the Petitioner shall pay his one-half share within 10 days of receipt of same.

3. That Leon Burkowski shall pay to the Respondent the sum of $400.00 per month as and for maintenance for Michael while Michael resides with the Respondent while attending college, commencing on the 16th of November, 1981, and continuing on the 16th of each month thereafter.

IT IS FURTHER ORDERED:

1. That IRENE BORKOWSKI shall have exclusive use and possession of the marital residence until the first to happen of the following events:

(a) The Respondent's remarriage or cohabitation on a resident conjugal basis with a male not related to her;
(b) Respondent's desire to sell;
(c) LARISSA no longer residing at the home on a permanent basis;
(d) LARISSA becoming emancipated;
(e) The Respondent no longer using the home as her permanent residence;

and upon one of the aforesaid events, Respondent and Petitioner shall place the aforesaid premises on the market for sale at the current market price, and upon the sale of said premises, the proceeds shall be equally divided by the parties.

2. That the Respondent shall pay the mortgage and real estate taxes on the premises from the date of the entry of this Order until the same is sold and upon the sale, Respondent shall receive credit for all principal reduction on the mortgage made by her from the proceeds of the sale. That the Respondent shall have the first right of refusal to purchase the said home; the right of the first refusal shall be exercised by the Respondent within 10 days after receipt of a contract for purchase from a bona fide third-party purchaser. Failure to exercise such right of first refusal within 10 days after receipt

of the contract of purchase, shall void the Respondent's right of first refusal.

3. Further, the Petitioner shall submit a list of personal property he desires from the marital residence to the Respondent. In the event the parties cannot agree on said property, then a court of competent jurisdiction shall decide same. Thereafter, the Respondent shall reasonably allow the Petitioner to remove all such items, if such items of personal property were acquired during the period of time the parties resided together as Husband and Wife in the marital residence.

4. That the parties hereto shall equally divide any maintenance and repair expense in excess of $500.00 on the marital residence, provided the Respondent gives the Petitioner advance notice of the expenditure, except in the case of a dire emergency, and the Petitioner will not unreasonably withhold his approval. The Petitioner shall have a reasonable period of time in which to determine if the expenditures asked for by the Respondent are necessary and proper and if the price thereof is a competitive price. In the event the parties are unable to agree on the above, then a court of competent jurisdiction shall decide the question.

ENTER:

/s/ Willard Lassers
Judge

Dated: .....

APPENDIX C

Rule 23 Order of the Appellate Court of Illinois, First District:

FIRST DIVISION
Filed August 9, 1982

82-78

This appeal arises from a supplemental order for judgment of dissolution of marriage entered on December 11, 1981. Pursuant to this order, petitioner was to pay $564 monthly for the support of his daughter, Larissa, and one-half of the private college educational expenses of his son, Michael, which amounted to $448 monthly, plus $400 monthly for support of Michael while he resided with respondent and attended college. On appeal, petitioner contends that the trial court abused its discretion in setting an amount of child support without hearing any evidence showing the petitioner's ability to pay.

Leon Borkowski, age 54, and Irene Borkowski, age 43, were married on June 5, 1960. Two children were born of their marriage: Michael on December 5, 1963, and Larissa on July 14, 1967. The parties separated in 1979 and a petition for dissolution of marriage was filed on December 10, 1979. A hearing was held on June 3, 1981, with respect to the grounds, and petitioner testified to his wife's mental cruelty. He also testified that he was an unemployed draftsman and could not work because of his physical and mental reaction to his marital problems. The court entered its finding as to grounds, but did not enter the judgment for dissolution of marriage. On October 7, 1981, a hearing was held on the issues of child support and contribution towards their education. The trial court ruled that petitioner should pay respondent $564 per month as child support for Larissa and one-half of Michael's tuition and personal expenses, which were to be ascertained by the parties for the entry of judg-

ment. At a hearing on October 28, 1981, petitioner objeced to the amounts of support and educational expenses and requested another hearing, which was denied. On November 16, 1981, petitioner again requested another hearing, which was denied, and the trial court entered the judgment for dissolution of the marriage. The parties were given joint custody of the children, although they were to live with respondent in the marital home. Respondent was to be responsible for the mortgage payments. The parties were to remain joint owners of an apartment complex called "Villa Fontana" pending its sale, and each was to receive half the income and proceeds. On December 17, 1981, the court entered a supplemental order that petitioner pay $564 monthly for the support of Larissa and $400 monthly for the maintenance of Michael for so long as he attended college and resided with respondent, plus tuition and educational expenses for Michael's private college education. On January 6, 1982, respondent filed a petition for rule to show cause alleging that petitioner had not complied with the supplemental order. On the same date, petitioner filed a motion to vacate the supplemental order and an affidavit that he was unemployed; he could no longer work due to illness; his assets did not exceed $5,000, whereas respondent had assets between $30,000 and $40,000; Villa Fontana was operating at a loss, and although he was trying to sell the property, there had been no offers to buy it; and, therefore, he could not meet the obligations of the supplemental order. Respondent filed no counter-affidavits. The motion to vacate was denied.

Petitioner contends that the trial court abused its discretion in setting an amount of child support without hearing any evidence showing the petitioner's ability to pay. He maintains that the trial court, in determining the needs of the children in conjunction with the means of the parents did not follow the Illinois Marriage and Dissolution of Marriage Act (IMDMA), which states in pertinent part:

"• • • [T]he court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct, after considering all relevant factors, including:

• • •

(5) the financial resources and needs of the non-custodial parent or parents. Ill. Rev. Stat. 1979, ch, 40, par. 505(a)."

He cites several cases wherein this court remanded child support orders that were not sustained by the record. (*Pierson* v. *Pierson* (1975), 31 Ill. App. 3d 106, 334 N.E. 2d 838; *Matthews* v. *Matthews* (1976), 42 Ill. App. 3d 1049, 356 N.E.2d 1083; *Schwartz* v. *Schwartz* (1976), 38 Ill. App. 3d 959, 349 N.E.2d 567; *Gray* v. *Gray* (1976), 39 Ill. App. 3d 675, 349 N.E.2d 926.) However, each of these cases is distinguishable from the instant case wherein the record is replete with evidence that petitioner and respondent had no income other than that from the Villa Fontana property, both would have to deplete their savings, and petitioner had given nothing towards child support from July 1980 until January 6, 1982, when respondent filed a petition for rule to show cause.

In the instant case, at the hearing on the grounds for dissolution of the marriage on June 3, 1981, petitioner indicated that he was unemployed because of shaky hands and a red nose due to nervousness over his marital difficulties. He was not on medication; the doctor just told him to relax. On August 13, 1980, he had filed an affidavit with the circuit court that his total monthly expenses were $1,671, his monthly net income was $100, and he had $70,000 in cash. At a hearing on September 18, 1981, petitioner agreed to pay for one-half of the educational expenses of Michael and Larissa. On October 7, 1981, petitioner agreed to pay one-half the child support since both he and respondent relied solely on Villa Fontana for their income. *At the same hearing the trial court*

stated that he saw the real estate agent's monthly statements and some tax returns in chambers, to which respondent's and petitioner's counselors agreed. A hearing was then held on the issue of child support. Both attorneys indicated they were ready for the proceeding. Respondent and petitioner were having trouble selling Villa Fontana as they could not even agree on an agent. Respondent had paid no child support since the beginning of the year because the support was to come out of the income or proceeds of Villa Fontana after repairs were made. However, since the property had not been properly maintained for some time, the money was used for repairs. Respondent had been supporting the children from her savings, which were down to $17,000. Petitioner's counsel stated that petitioner also had about the same amount at that time. Respondent's counsel suggested $500 a month child support would not be unreasonable. The trial court reviewed a monthly expense statement, which is not included in the record, and not considering Michael's clothing, lunches, car, and personal allowance determined that the children's expenses totalled $1128. The court also found that each parent should pay $564 plus one-half of Michael's tuition and personal expenses, which their attorneys were to calculate. At the October 28, 1981, hearing petitioner's counsel told the court that petitioner would be unable to pay $564 for Larissa plus one-half of Michael's tuition and personal expenses and that petitioner had only $8,000 in savings left. The trial court then stated that petitioner could have presented evidence of the assets of each party at the time of the child support hearing. It also came to light that since petitioner had left the marital home in July 1980, he had paid nothing to respondent. He stated, however, that he had given the children money for their tuition. Respondent's counsel maintained she had $5,000 left in savings. The manager of Villa Fontana testified that the income from the property was about $3,000 a month in the winter when gas bills averaged $7,000 to $8,000 a

month, but due to repairs the property was just breaking even. On November 16, 1981, respondent presented a statement that Michael's expenses, including college tuition and books totalled $10,593 per year, which, petitioner noted, amounted to $448 per month if respondent and petitioner split the expenses. The trial court, in response to petitioner's statement that he would be unable to pay, noted that from a conference with counsel in August 1981 his notes showed that petitioner had $75,000 in cash and respondent had $20,000. Petitioner's counsel denied this. The trial court then once again derided petitioner's counsel for not bringing evidence to the hearing on child support on the parties' cash assets, but decided that petitioner would not have to contribute to the mortgage.

On December 11, 1981, the trial court entered the supplemental order regarding child support and educational expenses "having heard testimony of the parties and argument of counsel, the court being fully advised in the premises." Thus we must conclude, due to the absence of any contrary indication in the order or record, that the court heard adequate evidence, received enough information or listened to sufficient law and argument, as the necessity of the particular case required, to enable the court to reach what it believed to be the right decision on the issue presented. *In re Marriage of Smith* (1962), 36 Ill. App. 2d 55, 59, 183 N.E.2d 559.

Moreover, petitioner did not request an evidentiary hearing on his assets until after the child support hearing, for which he had agreed he was prepared. In addition, the court made at least 2 references to an August 1981 conference in which the court saw tax returns and a real estate monthly expense statement. Therefore, we do not believe that petitioner was denied an evidentiary hearing on this issue. *In re Marriage of Shedbalkar* (1981), 95 Ill. App. 3d 136, 419 N.E.2d 409.

Regarding petitioner's argument that the income upon sale of Villa Fontana was a "tenuous expectation" that should not have been considered in the child support hearings, we direct him to the transcript wherein the trial court stated that he was "only thinking in terms of up to the sale of Villa Fontana, after that I think it's a whole new ballgame." The trial court could have determined from petitioner's tax records and the real estate agent's monthly statements that petitioner could afford the child support payments. We also note that petitioner had several different law firms representing him at the same time during these hearings. Furthermore, we do not find that a red nose and shaky hands, without further evidence, justifies petitioner's unemployment. As this court has stated in regard to maintenance for a former wife:

> "This language [in the Act] does not restrict a court to considering only his actual income at the time of trial, but also allows it to weigh evidence of its reasonable potential earning capacity. * * * The husband is free to chose [sic] his own lifestyle and to cease to be a productive individual in our social structure if he can afford such luxury. However, * * *, certain responsibilities assumed must be met within the confines of the law." *In re Marriage of Smith* (1979), 77 Ill. App. 3d 858, 862-863, 396 N.E.2d 859.

We see no reason not to apply such rule to the Act's "financial resources" factor which must be considered when determining the amount a noncustodial parent must pay towards child support.

In light of the above, we cannot conclude that the trial court abused its discretion in determining child support or that the determination was contrary to the manifest weight of the evidence. *In re Marriage of Dulyn* (1980), 89 Ill. App. 3d 304, 308, 411 N.E.2d 988.

We do agree with petitioner, however, that the entry in the supplemental order that petitioner pay $400 per

month for maintenance of Michael in addition to his educational and personal expenses is not in accord with the determination made in the record. Respondent presented Michael's college and personal expenses as totalling $10,593 per year. That comes to about $880 a month or $440 apiece if respondent and petitioner share the expenses as ordered by the trial court. There is no evidence in the record to support an additional $400 to be paid by petitioner for Michael's maintenance. We thereby reverse this portion of the order and remand for the trial court to amend the supplemental order in accord with the views expressed herein.

Petitioner also contends that this appeal must be decided by taking as true the allegations set forth in his motion to vacate the supplemental order since no counter-affidavits were filed by respondent. He maintains that uncontested affidavits are to be taken as true even where there are contrary allegations elsewhere. (*Central Clearing, Inc.* v. *Omega Industries, Inc.* (1976), 42 Ill. App. 3d 1025, 356 N.E.2d 852.) However, respondent stood on the findings of the trial court, not on contrary averments of fact in her pleadings. Although petitioner maintains that the findings of the trial court were not supported by the evidence, we disagree for the reasons discussed above.

Accordingly, the judgment of the circuit court of Cook County is affirmed in part, reversed in part, and remanded with directions.

Dated at Chicago, Illinois, this 9th day of August, 1982.

CAMPBELL, P.J., McCLOON and O'CONNOR, JJ.

APPENDIX D

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

November 30, 1982

Mr. Robert P. Sheridan
Attorney at Law
33 N. Dearborn St., S#2025
Chicago, IL 60602

No. 57408 — Leon Borkowski, petitioner, vs. Irene Borkowski, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court